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IN THE

Supreme Court of the United States

October Term, 1974
No. 75-213

DOMINICK ROMANO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1974

- -

DOMINICK ROMANO,

Petitioner,

-against-

UNITED STATES OF AMERICA

Respondent.

- -

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Dominick Romano, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on May 13, 1975.

OPINION BELOW

The opinion of the District Court of the Southern Distirct of New York by Judge McMahon, not reported appears in the appendix hereto A-18.

The Court of Appeals for the Second Circuit rendered an opinion, not yet reported. A copy of that opinion appears in the appendix A-1 .

The previous memorandum opinion of the District Court of the Southern District of New York by Judge McMahon which is not reported was rendered on a motion to vacate sentence. A copy of that decision is in the appendix, A-29. A Copy of the decision of the Court of Appeals for the Second Circuit in that matter is in the appendix at page A-21.

JURISDICTION

The jurisdiction of this court is involved under Title 28 of the United States Code, Section 1254 (1) which provides for review by the Supreme Court:

> "By writ of certiorari upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree".

QUESTIONS PRESENTED

1. Must the judgment of Conviction ans sentence be vacated because petitioner's sixth amendment right to confront witnesses against him was denied by the knowing use of perjured testimony at trial?

2. Was the petitioner entitled under the sixth amendment, to a hearing on the merits of his claim of perjury when the allegation could not be conclusively resolved by the files and records of the case?

3. Was the Second Circuit's interpretation of the successive petition

doctrine a conflict between circuits that demands resolution by the Supreme Court?

STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Sixth Amendment of the United States Constitution and 28 U.S.C. 2255 are involved and set forth in appendix A- 72.

STATEMENT OF THE CASE

Petitioner was found guilty at a jury trial of conspiracy to import narcotics in violation of sections 173 and 174 of Title 21, United States Code, on April 15, 1969. That trial arose out of an indictment handed down in 1964 that charged 28 persons, twelve named as defendants and 16 named as co-conspirators. The first jury trial was held in 1965 before Judge Bonsal for six of the major defendants, in which four were convicted. United States v. Armone, 363 F.2d 385 (2nd Cir.), cert. denied, 385 U.S. 957 (1966). In that trial Joseph Armone,

Stephen Grammuta, Vincent Parcelli, and Nicholas Viscandi were convicted while Alfred Armone and Alexander Schoenfeld were acquitted. The Government had charged in the indictment that the conspiracy continued in existance from 1956-1964.

Dominick Romano, the Petitioner, was not arrested until 1968. At that time, the Petitioner was 50 years old, an honarably discharged veteran of World War II, and had never previously been arrested. He was brought to trial on March 3, 1969 with his brother, Arnold Romano, Carmine Guanti, and Frank Sherbicki. Trial was held before Hon. Lloyd MacMahon in the Southern District of New York.

Clarence Asplund testified at the Petitioner's trial. Aspelund was a ship's cook and admitted courier of narcotics. At the Petitioner's trial Aspelund testified that he delivered narcotics to Joseph Cahill and Charles Hedges until "close to the end of 1959" and "close to Christmas".

At a prior trial involving the identical conspiracy (United States v. Cianchetti, U.S.D.C. Conn., 1964, Crim. #10, 250), Aspelund gave a significantly different version of his last delivery. At the Cianchetti trial Aspelund testified that he made his last delivery to Cahill and Hedges in September, 1959. His ship arrived in New York on September 9,

1959. He telephoned Joseph Cahill and informed him that he had a shipment. A meeting was arranged and subsequently Charles Hedges picked narcotics up at Aspelund's house in Connecticut. Hedges payment was $10,000.00 short. At a later meeting in New York City Hedges refused to make payment claiming the drugs were of inferior quality. After that meeting Aspelund was unable to locate Cahill or Hedges again. He tried various bars they frequented and called the telephone number Cahill had given to him. The number was disconnected.

On June 18, 1971, Petitioner filed a pro se petition, to vacate sentence pursuant to §2255 Title 28, United States Code. Among other grounds urged for vacating his sentence the Petitioner

alleged that perjury had been committed by several witnesses who testified at his trial.

No hearing was held and on January 5, 1972 Hon. Lloyd F. MacMahon denied the petition in all respects. Concering the Petitioner's claim that perjury had been committed at his trial the Court wrote:

> "Such unsupported conclusory allegations and speculations do not raise issues which would require an evidentiary hearing nor the ultimate relief petitioner seeks. (A-42)."

The Court further wrote:

> "Additionally, petitioner's allegation that the testimony of Hedges and Bourbonnais was perjurious because of government promises is without merit, as petitioner has failed to demonstrate any per-

jurious testimony. (A-48)."

An appeal was taken to the Court of Appeals from the decision of Judge MacMahon where it affirmed. Romano v. United States, 460 F.2d 1198 (2nd Cir.) Cert. denied, 409 U.S. 915 (1972).

The per curiam opinion of that Court stated, with regard to the allegation of perjury:

> "This claim is without merit. No evidence of perjury is noted and no false testimony is cited. (A-25)."

That Court concluded that the allegations of the petitioner were not sufficient to "entitle a petitioner to a hearing".

The current petition was filed on February 22, 1974. Again, the Petitioner asserted that perjury was committed by several witnesses who testified at his trial.

On July 25, 1974, this petition was dismissed by Hon. Lloyd F. MacMahon, without a hearing. The Court dismissed the Petition as a "successive petition within the meaning of 28 U.S.C. §2255". The Court also stated:

> "Moreover it clearly appears from the files and records in this case, which are accurately summarized in the opposing affidavit of Daniel J. Beller, Assistant United States Attorney ... that petitioner's present claims are frivolous and without merit and that he is entitled to no relief."

An appeal was taken to the Court of Appeals from that decision. It was affirmed by the Court of Appeals in a decision not yet published (A- 1). The opinion of Judge Moore stated that:

> "We affirm the denial of the §2255 motion on the basis that the motion is frivilous, totally without merit, and devoid of any support in the trial record or the affidavits submitted with this motion".

REASONS FOR GRANTING THE WRIT

P O I N T I

THE PETITIONER'S SENTENCE AND JUDGMENT OF CONVICTION MUST BE VACATED BECAUSE IT WAS OBTAINED THROUGH THE KNOWING USE OF PERJURED TESTIMONY.

The Petitioner's motion to vacate sentence alleges that perjury was committed by three witnesses who testified on behalf of the prosecution at the Petitioner's trial. The Petition also alleges that Government officers, specifically the Assistant United States Attorney prosecuting the case, and a federal narcotics agent were aware of the perjury and made no effort to correct this testimony. The

petition further alleges that these Government officers deliberately withheld documentary evidence which would have contradicted the perjured testimony given at trial.

The knowing use of perjured testimony by a prosecutor or the deliberate suppression of evidence constitutes a denial of due process of law and warrants the granting of a new trial. Mooney v. Holohan, 294 U.S. 103, (1935); Pyle v. Kansas, 317 U.S. 213, (1942).

The Second Circuit apparantly chose to adopt the position that the use of perjured testimony by the prosecution was proper as long as the defense counsel did not recognize it as such.

Clarence Aspelund testified at the Petitioner's trial. Aspelund was a ship's cook and admitted courier of narcotics. At the Petitioner's trial Aspelund testifed that he continued to deliver narcotics to Joseph Cahill and Charles Hedges until "close to the end of 1959" and "close to Christmas".

At a prior trial involving the identical conspiracy (United States v. Cianchetti, Crim. No. 10,250 (D. Conn. 1964) Aspelund gave a significantly different version of his last delivery. At the Cianchetti trial Aspelund testified that he made his last delivery to Cahill and

and Hedges in September, 1959. His ship arrived in New York on September 9, 1959. He telephoned Joseph Cahill and informed him that he had a shipment. A meeting was arranged and subsequently Charles Hedges picked narcotics up at Aspelunds's house in Connecticut. Hedges payment was $10,000 short. At a later meeting in New York City Hedges refused to make payment, claiming the drugs were of inferior quality. After that meeting Aspelund was unable to locate Cahill or Hedges again. He tried the various bars they frequented and called the telephone number Cahill had given him, OR4-4197. The number was disconnected.

Aspelund's perjury is significantly material. All of Petitioner's alleged

activities were related to the activities of Joseph Cahill. The Petitioner has tirelessly contended that all of Cahill's activities ended prior to September 30, 1959, the date on which the bar of the statute of limitations fell in the activities of this case.

The Court of Appeals rejected this defense on the direct appeal of Petitioner's conviction. At that time, the Court concluded that "From the evidence adduced, the jury could properly conclude that the Romanos had not withdrawn from the conspiracy on or before the date of the statutory bar"

Obviously, Aspelund's testimony that he continued deliveries to Cahill through the end of 1959 was evidence

that withdrawal had not occurred prior to September 30, 1959.

The government's answer suggests that Aspelund's testimony at the Romano trial was "substantially the same testimony" that he gave at the earlier (Cianchetti) trial. The Government's answer further suggests that any discrepancy was somehow due to the delay between the transaction and the trial cause by the Petitioner's flight.

Both assertions are baseless and absurd. Dominick Romano was not a fugitive and it is extremely disingenous of the government to assert that he was. As for the testimony itself, the government met with the witnessess and was able to prepare them for their testi-

mony. The earlier transcript as well as the government's entire file was available to the prosecutors to aid in its preparation. It is in error to suggest that Aspelund was relying on his memory and made an innocent error.

The prosecutor's burden to correct perjured testimony cannot be as easily discharged as the government would propose. In Levin v. Katzenbach, 363 F. 2d (D.C. Cir., 1966), the Court held that the duty of the prosecutor to disclose favorable evidence may not depend on whether more able or diligent counsel might possibly have come upon the evidence himself. 363 F.2d at 291.

While it is true that Clarence Aspelund's prior testimony was a matter of public record, the prosecutors in this case were fully aware that

petitioner's counsel was not familiar with the prior testimony. The record of petitioner's trial clearly reflects that there was but the copy of the transcript of the Cianchetti trial available to all counsel and that the district court refused to allow that transcript to leave the courtroom.

The government was required to prove that at least one of the overt acts charged in the indictment occurred after September 30, 1959. But, before the jury could reach the question of whether a post-September overt act had been committted they had to determine that there was one conspiracy, that the Petitioner had not withdrawn therefrom, and that he was chargeable with the

overt acts admittedly not committed by the Petitioner. Aspelund's testimony was relevant to each of these three questions.

At no time did the prosecution through Assistant United States attorney Michael Leisure or Agent Thomas Dugan of the Bureau of Narcotics and Dangerous Drugs, bring Aspelund's highly prejudicial and material misstatement of facts to the attention of the defense, the court, or the jury.

The representatives of the Government have an affirmative responsibility to correct false testimony and elicit the truth. Napue v. Illinois, 360 U.S. 264 at 270, (1958); see also People v.

Savvides, 1 N.Y. 2d 554, 154 N.Y.S. 2d 886 (1956).

The prosecution must make available all material and relevant evidence which may be helpful to the defendant. United States v. Zhorowski, 271 F.2d 661 (2nd Cir., 1959).

> "The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which the defendant is tried. In the long run it is more important that the government disclose the truth so that justice may be done that some advantage might accrue to the prosecution toward assuring a conviction".
>
> 271 F.2d at 668 (Citing Berger v. United States, 295 U.S. 78, 88

The requirement that the Goverment prove its case beyond a reasonable doubt means that the Government, by failure to disclose evidence, should not prevent the defendant from producing evidence which might creat a reasonable doubt. (271 F.2d at 668). The failure to disclose Aspelund's perjury in itself, deprived the defense of an opportunity to creat a reasonable doubt in the minds of the jurors.

The fabricated element of Aspelund's testimony dealt directly with an issue upon which the jury had to decide--whether the prosecution of the defendant was barred by the Statute of Limitations. The

failure of the prosecution to correct Aspelund's testimony was an invasion of the jury's province as the sole finders of fact and denied the Petitioner due process of law.

The jurors were entitled to know the nature of Aspelund's testimony so that they could properly assess Aspelund's credibility and competence to testify. Had the jury been aware of Aspelund's perjury it might well have concluded that all his testimony was fabricated. See Napue v. Illinois, 360 U.S. at 270, (1959).

The failure of the prosecutor to correct the perjured testimony of its witness denied the Petitioner due process of law.

P O I N T II

AN ALLEGATION THAT PERJURED TESTIMONY WAS INSTRUMENTAL IN SECURING PETITIONER'S CONVICTION COULD NOT BE CONCLUSIVELY RESOLVED BY THE FILES AND RECORDS OF THIS CASE.

In its decision on Petitioner's present petition the District Court held that the records and files of the case demonstrated "clearly" that Petitioner's claim was without merit. Such a decision is completely at odds with undisputed controlling law.

The Petitioner alleged in his petition that his conviction was secured by means of perjured testimony

by several prosecution witnesses. Without the benefit of a hearing at which Petitioner could present evidence of such perjury, the District Court concluded that such actions did not occur. The decision is remarkable and cannot be sustained.

An allegation that the prosecution knowingly used perjured testimony and that the testimony had a vital effect on the verdict is a sufficient ground to entitle the Petitioner to a hearing upon the charges. United States v. Derosier, 229 F.2d 599 (3rd Cir. 1956); Smith v. United States, 259 F.2d 125 (9th Cir. 1958); Andrews v. United States, 286 F.2d 829 (5th Cir. 1961).

A hearing is mandated because proof of perjury is rarely contained in the record of a trial. If it were, only the incompetent administration of justice would allow it to slip by.

The facts upon which Petitioner's claim rests are not part of the record Petitioner specifically informed the District Court in his Memorandum of Law that he intended to subpoena certain corporate and government records for presentation at a hearing. The Court was further informed that, based upon information already gained, the Petitioner believed these records would provide additional proof of the allegations contained in the petition.

The District Court was also supplied with the transcript of part of the testimony given by one of the alleged perjurors, Clarence Aspelund at prior trial involving the same conspiracy (United States v. Cianchetti Crim. NO. 10, 250, [D. Conn. 1964]).

Aspelund's prior testimony was unmistakeably different from that version he dutifully delivered at Petitioner's trial. The differences were material and significant, yet no hearing was ordered.

The petitioner has never had a hearing on the merits of his claim for relief. The merits of his claim cannot be decided without such a hearing. Since the facts upon which

petitioner s claim of perjury is predicated are outside the record, it is impossible for an examination of the records and files to conclusively resolve his assertions.

With all due respect to Judge MacMahon only a human lie detector could have decided "conclusively" that testimony was truthful merely by listening to it. Despite the historic protection against perjury allegedly offered by cross-examination, perjury is unfortunately rife in our judicial system.

Evidence of perjury appears not from the testimony itself, although it may, but from the comparison of testimony with extrinsic evidence. Tes-

timony must be checked against known facts and where as here, those facts are not part of the record, a hearing must be held. Andrews v. United States, 286 F.2d 829, 831 (5th Cir. 1961). That hearing has yet to be held in this case.

In this sense this case is not unlike Sanders v. United States, 373 U.S. 1 (1963). The petitioner in Sanders alleged that his guilty plea had been taken while he was under the influence of drugs administered by jail authorities. The District Court ruled that the files and records of the case "conclusively showed" that the petitioner's claims were without merit.

The Supreme Court stated that the files and records of the case could not possibly show whether petitioner was under the influence of narcotics at the time of his plea and thus, legally unable to intelligently waive his constitutional rights. Likewise, here, the files and records of the Romano trial could not possibly show conclusively that perjury was not committed by witnesses called by the government.

The petitioner claims here that testimony of certain witnesses was perjured, and that it resulted in petitioner's conviction.

The proof of perjury is not alone in the files and records of this case,

but in extrinsic evidence which plainly contradict the testimony which appears on the record. To rely on the "files and records", to deny this petition is to allow the perjury to again work its mischief.

P O I N T III

IT WAS IN ERROR TO DENY APPELLANT'S PETITION AS A SUCCESSIVE PETITION WHEN THERE HAS BEEN NO DECISION ON THE MERITS OF HIS CLAIM

It is patently clear that the petition could not be properly dismissed as a successive petition. In Sanders v. United States, 373 U.S. 1, (1963) this Court set forth definitive rules establishing the procedure to be

followed by District Courts in handling petitions brought pursuant to 28 U.S.C. §2255.

In specific reference to that section of the statute which permitted the Distirct Court to summarily dismiss a "successive petition" the Court wrote:

> "Controlling weight may be given to denial of a prior application for federal habeas corpus or §2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.
> 373 U.S. at 15."

It is plain from reading the decisions of the District Court and the Court of Appeals, that, as to Petitioner's claims of perjury, the prior petition was not denied on the merits. Neither the District Court nor the Court of Appeals believed the Petitioner's prior application set forth sufficient facts in support of its conclusions that perjury had been committed at Petitioner's trial. The allegations were held insufficent to require a hearing.

This determination obviously does not satisfy the Court's vision of a resolution which forecloses further litigation of a ground raised by a

§2255 petitioner. The question of whether perjury was actually committe at Petitioner's trial was not resolved by the trial court. Absent such a determination on the first petition, a second petition cannot be denied as successive. Stephens v. United States, 246 F.2d 607 (10th Cir. 1957).

The Court of Appeals was not und the illusion that a determination on the merits had been made on appeal from the previous denial.
The Court held that Petitioner's allegations did not present a "sufficient basis for vacating a judgment of conviction" nor were they sufficient to "entitle petitioner to

a hearing on the alleged use of perjurious testimony".

A denial of §2255 petition because of the insufficiency of the pleading is not an adjudication on the merits. A denial on the merits "means that if factual issues were raised in the prior applications, and it was not denied on the basis that the files and records conclusively resolved these issues, an evidentiary hearing was held." Sanders v. U.S., Supra. at 16.

No hearing was held on the prior application. The ruling of the Court that the allegations were insufficient was "merely a ruling that petitioner's pleading was deficient". Sanders

v. U.S., Supra., 373 U.S. at 19.

This determination does not satisfy the requirements of Sanders, and so cannot serve as a predicate for the denial of a subsequent petition as "successive". Sanders v. U.S., Supra.; Villarreal v. United States, 461 F.2d 765, 767, (9th Cir. 1972); Gomez v. United States, 396 F.2d 323, 325 (9th Cir. 1968).

The Second Circuit's interpretation of the successive petitions doctrine constitutes a conflict between the circuits that demands resolution by the Supreme Court.

The cases establish conflicting standards for determining whether or

not a petition is successive.

In affirming the District Court's denial of the petitioner's claims in the instant case, the Court states that the standard for denial as successive whether the new or different facts were known or should have been known to the defendant at the filing of the earlier motion.

This decision is in conflict with Moore v. United States, 464 F.2d 663, 665 (9th Cir. 1972) which states that "Denial of a prior application for secion 2255 relief does not forclose a subsequent petition for the same relief on a ground not earlier presented, unless that failure to assert the claim was an abuse of the

section 2255 process".

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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on the brief.

DECISION OF THE COURT OF APPEALS ON THE SECOND PETITION

UNITED STATES COURT OF APPEALS

For the Second Circuit

- - - - - - - - - - - - -

No. 524 - September Term, 1974.

(Argued March 11, 1975 Decided May 13, 1975).

Docket No. 74-2145

- - - - - - - - - -

UNITED STATES OF AMERICA,

Appellee,

v.

DOMINICK ROMANO,

Appellant.

- -

DECISION OF THE COURT OF APPEALS ON THE SECOND PETITION

Before:

MANSFIELD, FEINBERG, and MOORE,

Circuit Judges.

- -

Appeal by Dominick Romano from denial of a motion to vacate judgment and sentence pursuant to 28 U.S.C. §2255 in the Southern District of New York, Lloyd F. MacMahon, Judge. The District Court found that the motion was a successive one and that the claims of subornation of perjury were frivolous.

Denial affirmed

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DECISION OF THE COURT OF APPEALS ON THE SECOND PETITION

HENRY B. ROTHBLATT, New York, NY (Rothblatt, Rothblatt, Seijas & Peskin, New York, NY,) for Appellant Romano.

DANIEL J. BELLER, Asst. United States Attorney (Paul J. Curran, United States Attorney, Southern District of New York and Lawrence S. Feld, Assistant United States Attorney, of counsel), for Appellee.

- -

MOORE, Circuit Judge:

This case comes to us on appeal from a denial by Judge Lloyd F. MacMahon in the U.S. District Court for the Southern District of New York of a §2255 petition to vacate

DECISION OF THE COURT OF APPEALS ON THE SECOND PETITION

sentence on alternative grounds 1) that the petition constitutes a successive motion and 2) that the claims, allegations of perjury and subornation of perjury, were frivolous.

Dominick Romano was convicted on March 14, 1969 of conspiracy to violate the federal narcotics law, 21 U.S.C. §§173 and 174, following a jury trial. Romano's conviction was affirmed in United States v. Guanti, 421 F.2d 792 (2d Cir.), cert. denied, 400 U.S. 832 (1970) and the facts supporting conviction are fully set out in that opinion.

The indictment under which Romano was tried had been filed on September

30, 1964 and named 28 co-conspirators. The case of characters included the French exporters, the couriers who brought the drugs to New York, the importers, men to carry the drugs to the wholesalers, and the wholesalers. The first trial under the indictment took place in 1965 and did not include Dominick Romano. See United States v. Armone, 363 F.2d 385 (2d Cir.) cert. denied, 385 U.S. 957 (1966). Four of the co-conspirators, Appellant Dominick Romano, Arnold Romano, Carmine Guanti, and Frank Sherbicki, were tried subsequently in 1969.

Because the indictment was obtain- in September 1964, the government in the 1969 trial could not rely on overt

acts which occured prior to September 30, 1959 since the Statute of Limitations had run as to those acts. The trial judge specifically instructed that the jury could not find the defendants guilty unless the jury first found that those specific alleged overt acts which occurred after that date had been committed by one of the co-conspirators.

On June 18, 1971, Romano filed a §2255 petition urging twelve grounds for vacation of the judgment and sentence. Six of these allegations involved perjury or subornation of perjury by the prosecution. The petition specifically named two government witnesses, Hedges and Bourbonnais,

DECISION OF THE COURT OF APPEALS ON THE SECOND PETITION

as having given perjured testimony. In his decision of January 5, 1972, Judge MacMahon denied the §2255 motion finding that the perjury contentions as to Hedges were bare speculation unsupported by reference to testimony or fact. As to Bourbonnais, the court found that the perjury claims were patently frivolous. This court affirmed. See Romano v. United States, 460 F.2d 1193 (2d Cir.), cert. denied, 409 U.S. 915 (1972).

On February 25, 1974, Romano filed the instant §2255 petition, urging as grounds for vacation 1) perjury by government witnesses; 2) deliberate suppression of exculpatory evidence by the government; and 3) subornation of

perjury by the prosecution. The lower court denied this motion on July 25, 1974 without a hearing finding that the petition was a successive petition within the meaning of Sanders v. United States, 373 U.S. 1, 9 (1963). Alternatively the court found the claims to be frivolous and without merit.

Romano's claim of deliberate suppression of exculpatory evidence involves business and/or employment records of two government witnesses, Clarence Aspelund and Charles Bourbonnais, and grand jury minutes. This claim is specious inasmuch as most of these materials were marked as government exhibits at the Romano trial and

were not hidden by the government, cf. Mixen v. United States, 469 F.2d 203 (8th Cir. 1972), cert. denied, 412 U.S. 906 (1973), or could have been subpoenaed by Romano's experienced trial counsel.

Turning to the claims of perjury regarding Hedges and Bourbonnais, we believe that these claims are barred by the January 1972 decision of Judge MacMahon. Romano recognizes that the second §2255 motion "constitute[s] a resubmission of the issues presented in petitioner's prior motion,"[1] but argues that this

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[1]Affidavit in Support of Motion to Vacate Sentence IND. #64 CR 828, paragraph 15.

motion is not a successive motion under Sanders v. United States because "(1) no hearing was held on the previous motion; (2) the facts alleged in support of this motion differ from those presented in petitioner's initial motion and were not deliverately withheld from the prior motion; and (3) the prior motion dismissed without a hearing as failing to allege a factual basis for the relief sought."[2]

These arguments indicate a lack of understanding of the Sanders decision and its progeny. Sanders established standards for determining

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[2]Ibid.

DECISION OF THE COURT OF APPEALS ON THE SECOND PETITION

the effect of denial of a prior §2255 petition on a successive application. Noting that where the second application is shown on the basis of the application, files and records of the case to be without merit, denial without a hearing is the proper course, the Court went on to establish standard for successive motions:

> Controlling weight may be given to denial of a prior application for federal habeas corpus or §2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. Sanders v. United States, 373 U.S. at 15.

DECISION OF THE COURT OF APPEALS ON THE SECOND PETITION

Romano equates "decisions on the merits" with "hearing" but this position is not supported by Sanders which recognizes that a §2255 application can be denied without a hearing where it can be determined on the basis of the records and files that the application is "conclusively without merit". See also Willaims v. United States, 481 F.2d 339, 345 (2d Cir.), cert. denied, 414 U.S. 1010 (1973); Rodriguez v. United States, 473 F.2d 1042 (5th Cir. 1973); Tucker v. United States, 427 F.2d 615 (D.C. Cir. 1969).

Sanders addresses successive petitions on the basis of litigation

of the "same ground". Romano recognizes that the issues in this petition are the same issues as those raised in the first but urges consideration of this second petition because of the presentation of different facts which were not deliberately overlooked in the first petition. It is the general principle that a Sanders denial of a successive motion applies to the situation where new facts are alleged in the second petition on the same ground if these facts were known or should have been known at the time of the first petition. The standard for denial as successive is not a showing of no deliberate with-

holding of the new or different facts, but rather whether the new or different facts which were omitted from the prior motion were known or should they have been known to the defendant at the time of filing the earlier motion. See e.g. Green v. United States, 206 F. Supp. 620 (D.C. Mass. 1962) aff'd 313 F.2d 6 (1st Cir.) cert. dismissed, 372 U.S. 951 (1963).

In addition to claims of perjury regarding Hedges and Bourbonnais, Romano claims for the first time in this motion that Clarence Aspelund committed perjury and that the government knew it. At an earlier trial, United States v. Cianchetti (U.S.D.C. Conn. 1961 Crim. #10,250), Aspelund

testified that his final narcotics delivery to Cahill and Hedges occurred in September 1959. At Romano's trial in 1969 Aspelund testified that the last delivery occurred "close to the end of 1959, close to Christmas." The transcript of the Cianchetti trial was available to Romano's defense counsel and, while the apparent inconsistency was the proper subject of cross-examination, it certainly does not support a claim of perjury. Nor is it clear to us how the inconsistency gives rise to an inference that the prosecution suborned perjury. Romano has not produced any evidence of improper activity by the government and thus his motion relying on an affidavit, con-

taining only conclusory allegations as to prosecutorial misconduct regarding Aspelund's testimony, was properly denied without a hearing. See e.g. Sirring v. United States, 370 F.2d 862 (1st Cir. 1967).

Finally, Romano emphasizes the apparently inconsistent dates in relation to the Statute of Limitations having run in September 1959. This adds nothing to his case inasmuch as the government relied on overt acts after that date and as we indicated above, the judge properly charged the jury on the effect of their finding on whether or not post-September 1959 overt acts occurred.

DECISION OF THE COURT OF APPEALS ON THE SECOND PETITION

Once an overt act was found to have occurred after September 30, 1959, the jury could properly consider other evidence of an ongoing conspiracy.

We affirm the denial of the §2255 motion of the basis that the motion is frivolous, totally without merit, and devoid of any support in the trial record or in the affidavits submitted with this motion.

Dominick Romano v. United States

ENDORSEMENT
74 Civ. 943-LFM

The facts resulting in petitioner's conviction for violation of 21 U.S.C. §§ 173 and 174 are fully set forth in United States v. Guanti, 421 F.2d 792 (2d Cir.), cert. denied, 400 U.S. 832 (1970), and in the government's brief on that appeal. Familiarity with the facts will therefore be assumed.

The instant petition for post-conviction relief under 28 U.S.C. § 2255 urges three grounds: (1) perjury by government witnesses; (2) deliberate suppression of exculpatory evidence by the government

ENDORSEMENT

and (3) the government's subornation of perjury. An earlier petition for post-conviction relief, based upon the same grounds now asserted, was considered and rejected by this court in an opinion in 71 Civ. 2851, filed January 5, 1972. The instant peition is therefore dismissed as a successive petition within the meaning of 28 U.S.C. §2255. Sanders v. United States, 373 U.S. 1, 9 (1963).

Moreover, it clearly appears from the files and records in this case, which are accurately summarized in the opposing affidavit of Daniel J. Beller, Assistant United States Attorney, sworn to July 17,

ENDORSEMENT

1974, which summary we hereby adopt as our own findings, that petitioner's present claims are frivolous and without merit and that he is entitled to no relief.

Accordingly, the within petition is dismissed without a hearing.

So ordered.

Dated: New York, NY
July 25, 1974

/s/ Lloyd F. MacMahon
LLOYD F. MacMAHON

United States District Judge

OPINION OF THE SECOND CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----*----

No. 761 - September Term, 1971

(Argued May 9, 1972. Decided May 30, 1972

Docket No. 72-1107

----*----

DOMINICK ROMANO,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Respondent-Appellee.

----*----

Before:

FRIENDLY, Chief Judge,
MOORE and ANDERSON, Circuit Judges.

OPINION OF THE SECOND CIRCUIT COURT OF APPEALS

----*----

Appeal from an order of the District Court for the Southern District of New York, Lloyd F. MacMahon, District Judge, denying without a hearing a motion to vacate a judgment of conviction pursuant to 28 U.S.C. § 2255 and denying a motion that the District Judge disqualify himself pursuant to 28 U.S.C. § 144.

Affirmed.

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OPINION OF THE SECOND CIRCUIT COURT OF APPEALS

Henry B. Rothblatt, New York, N. Y. (Rothblatt, Rothblatt, Seijas & Peskin, New York, N. Y., on the brief), for Appellant.

John C. Sabetta, Assistant United States Attorney, New York, N. Y., (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, N.Y. and Peter F. Rient, Assistant United States Attorney, New York, N.Y., of counsel), for Appellee.

PER CURIAM:

Dominick Romano appeals from an order denying without a hearing his motion to vacate a judgment of conviction

pursuant to 28 U.S.C. § 2255 and denying his motion that the District Judge disqualify himself from determining the motion for post-conviction relief pursuant to 28 U.S.C. § 144. Finding no error, we affirm.

Appellant is presently serving a 20-year sentence which was imposed after he was found guilty of having conspired to violate the Federal Narcotics Laws, 21 U.S.C. § 173, 174. The judgment of conviction was affirmed by this court in United States v. Guanti, 421 F.2d 792 (2d Cir.), cert. denied, 400 U.S. 832 (1970). For a statement

of the facts in this case see the opinion in Guanti, supra.

In the papers submitted in support of his motion to vacate his judgment of conviction, appellant alleges that the prosecution knowingly used perjurious testimony at his trial. This claim is without merit. No evidence of perjury is noted and no false testimony is cited. The fact that a prosecution witness may have a criminal record is not sufficient basis for vacating a judgment of conviction when the witness' criminal record was known at the time of trial. Similarly, the

mere assertion that a witness might have had a motive to lie, when unsupported by any fact, does not entitle a petitioner to a hearing on the alleged use of perjurious testimony.

Also without merit is the claim of prejudice emanating from an allegedly improper in-court photographic identification of one prosecution witness by another. According to the appellant, the in-court identification was tainted by an impermissibly suggestive pre-trial confrontation between the two witnesses. The appellant argues that this confrontation was in violation of his consti-

tutional rights as enumerated in United States v. Wade, 388 U.S. 218 (1967), Gilbert v. California, 388 U.S. 263 (1967) and Stovall v. Denno, 388 U.S. 293 (1967).

None of appellant's constitutional rights were violated when these two witnesses met at an interview before trial. Appellant's right to counsel does not extend to the government's interviewing of witnesses in preparation of its case when the appellant was not even present at this meeting.

Appellant's third claim, that he was deprived of the effective assis-

tance of counsel was rejected by this court in an earlier appeal. Guanti, supra at 799. As no additional facts are cited in support of the claim, it can be dismissed as being without merit.

The remaining contentions, that the District Judge should have disqualified himself from determining this motion and that appellant's right to testify in his own behalf was frustrated because the trial court denied his motion to sever his trial from that of his brother, are without any merit.

The order of the District Court is therefore affirmed.

MEMORANDUM OPINION OF MACMAHON, D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

DOMINICK ROMANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
----------x

PRO SE

71 Civ. 2851

MEMORANDUM

38153

MacMahon, District Judge

Petitioner Dominick Romano was one of four defendants convicted by a

jury after a two-week trial of conspiracy to import and distribute huge amounts of heroin into the United States from France, in violation of the federal narcotics law. The judgments were affirmed on appeal. United States v. Guanti, 421 F. 2d 792 (2d Cir.), cert. denied, 400 U.S. 832 (1970). Petitioner's trial was the second to arise from a single indictment filed in 1964 because petitioner and his three co-defendants were fugitives at the time of the first trial (hereinafter "Armone trial"). See United States v. Armone, 363 F. 2d 385 (2d Cir.), cert. denied,

385 U.S. 957 (1966).

Petitioner now moves for post-conviction relief, pursuant to 28 U.S.C. § 2255, for an evidentiary hearing, for an order vacating a judgment of conviction and sentence imposed upon him on April 15, 1969, and for disqualification of the trial judge from hearing and determining these proceedings for bias and prejudice. We deny the petition in all respects.

Petitioner's application, originally submitted pro se but later amended by retained counsel, is not a model of clarity. It contains twenty-eight

pages of bald conclusions, unsupported allegations, rank speculation, material misstatements of the record and rambling dissertations on the law. The application purports to list twelve separate violations of petitioner's constitutional rights, but after careful scrutiny we find many of them repetitious.

We shall first consider whether petitioner is entitled to a hearing.

We are required to hold " 'a prompt hearing' when the allegations of deprivation of constitutional rights raise disputed issues of fact in order

to 'determine the issues and make findings of fact and conclusions of law' with respect to them 'unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.' 28 U.S.C. § 2255 . . . ." United States v. Malcolm, 432 F. 2d 809, 812 (2d Cir. 1970), and cases cited therein.

Evidentiary hearings are not required, however, on nonconstitutional claims, nor on constitutional claims which have been adversely decided by a trial or appellate court. Kaufman v. United States, 394 U.S. 217, 227 n. 3

(1969). Constitutional claims, despite previous consideration or previous opportunity for consideration, do require an evidentiary hearing "(1) where a federal trial or appellate court said nothing because the issue was not raised; (2) where it was unclear whether the 'say' was on the merits; (3) where new law had been made or facts uncovered relating to the constitutional claim since the trial and appeal; and (4) where the trial or appellate court based its rulings on findings of fact made after a hearing that was not full and fair." Kapatos v. United States, 432 F. 2d 110,

113 (2d Cir. 1970), cert. denied, 401 U.S. 909 (1971); Sanders v. United States, 373 U.S. 1 (1963). Keeping these principles in mind, we now turn to petitioner's claims.

IMPERMISSIBLE SUGGESTIVE IDENTIFICATION OF CHARLES HEDGES BY CHARLES BOURBONNAIS

Charles Hedges and Charles Bourbonnais were government witnesses at both the Armone trial and petitioner's trial, and both were involved in the conspiracy of which petitioner was convicted. Petitioner contends that Bourbonnais' in-court identification of a picture of Hedges was tainted by an im-

permissibly suggestive pre-trial identification, in violation of his constitutional rights, as set forth in United States v. Wade, 388 US 218 (1967), Gilbert v. California, 388 US 263 (1967), and Stovall v. Denoo, 388 US 293 (1967)

Specifically, petitioner claims the impermissive suggestion occurred when the prosecution brought Bourbonnais and Hedges together in a face-to-face confrontation prior to trial in the office of Assistant United States Attorney William Tendy. Petitioner further contends that without this "one on one" process of confrontation, Bourbon-

nais would have had no independent source by which to identify Hedges. In support of this contention, petitioner points to Bourbonnais' testimony at the Armone trial regarding the meeting in Mr. Tendy's office:

Bourbonnais "A. I did not recognize Mr. Hedges at that particular time. He himself said hello and recited the incident and the circumstances under which we met previously.

* * *

Mr. Kasanof "Q. It wasn't until Mr. Hedges said something to you that you recognized him?

Bourbonnais "A. I did not recognize him, sir. I recognized the incident of our previous meeting at the time he met me on 55th Street and First Avenue." (Armone Tr. 2438-2439)

No constitutional right of petitioner was violated by the meeting of Bourbonnais and Hedges in Mr. Tendy's office. The Wade, Gilbert and Stovall trilogy are inapplicable. These and other cases upon which petitioner relies deal with pre-trial confrontations of an accused for identification, absent counsel, by a prospective government witness. In those cases, the Court held

that a post-indictment lineup was a critical stage of the prosecution at which a defendant was entitled to the assistance of counsel. United States v. Wade, supra, 388 U.S. at 237.

Here, the pre-trial confrontation was between prospective government witnesses and not, as in the cases cited by petitioner, between an accused and a prospective government witness. Petitioner was not present at the meeting in Mr. Tendy's office, and it would be an absurdity for us to hold that petitioner's right to counsel extends to the government's interviewing of witnesses

in the preparation of its case.

Moreover, the Armone transcript reveals that Bourbonnais was hesitant in identifying Hedges because they had only met twice before and because Bourbonnais was of the opinion that Hedges played a small part in the conspiracy. (Armone Tr. 2433-2434; 2606-2607.)

Accordingly, we conclude that petitioner's claim of denial of a constitutional right because of a tainted in-court identification is without merit.

PROSECUTION'S DELIBERATE SUBORNATION OF PERJURY

MEMORANDUM OPINION OF MACMAHON, D.J.

Petitioner's contentions numbered I, II, VI, IX, X and XII all concern his allegation that the prosecution suborned perjury. He alleges in I, II and VI that the prosecution's subornation of perjury improperly and illegally influenced both the grand jury to indict him and the petit jury to convict him. He further alleges in IX and X that false statements by the prosecution denied him a full and fair review of his case both on appeal and on his petition for certiorari. Finally, he contends in XII that the government's grant of immunity from prosecution to

Hedges and Bourbonnais and its promise to reduce their sentences is a process so likely to produce perjury that it violates due process of law.

It would be a gross understatement to say petitioner's application lacks specificity in support of these allegations. Sprinkled here and there throughout his twenty-eight page application are clues to the alleged perjury, although he never identifies one perjurious statement. Petitioner does, however, state that the testimony of both Charles Hedges and Charles Bourbonnais was perjurious.

MEMORANDUM OPINION OF MACMAHON, D.J.

Considering Hedges' testimony first, petitioner makes the broad conclusory statement that Hedges' testimony was given to "create as impressive a picture of prosecution potential as he could for the sole purpose of enhancing the possibility of earning his freedom as a reward for the combination of fact and perjurous (sic) fantasy his testimony represented." Nowhere, however, does petitioner cite a single perjurious statement made by Hedges; nor does he even cite any testimony given by Hedges. Such unsupported conclusory allegations and spe-

culation do not raise issues which would require an evidentiary hearing, nor the ultimate relief petitioner seeks. Cf. Burris v. United States, 403 F. 2d 399, 402 (7th Cit. 1970), cert. denied, 401 U.S. 921 (1971).

Turning to Bourbonnais' alleged perjury, petitioner contends that Hedges, at the identification confrontation with Bourbonnais in Mr. Tendy's office, was allowed by the prosecution to recite events to Bourbonnais which never occured and that this recital became Bourbonnais' entire testimony. He further contends that such an identifi-

cation procedure by the government could "accurately (be) categorized as deliberate subornation of perjury." These contentions are patently frivolous.

The vast majority of Bourbonnais' direct testimony described the procedure he followed as a courier in bringing narcotics into the United States and the various contacts he had here and abroad. Approximately seven pages of direct testimony out of a total of seventy-four pages concerned Hedges. The record is perfectly clear that Bourbonnais had only minimal contact with Hedges and that it was necessary for Hedges to re-

fresh Bourbonnais' memory of their previous meetings. This is borne out by the cross and redirect examinations of Bourbonnais at the Armone trial:

Cross

Bourbonnais "A. Mr. Hedges' picture was shown to me on several occasions and I could never identify him for the simple reason that he was just a small part in this transaction, and he had complete --" (Armone Tr. 2433-2434.) (Emphasis added.)

Redirect

Mr. Morvillo "Q. Do you remember on cross-examination Mr. Kasanof asked you about a meeting that took place in Mr.

Tendy's office with Mr. Hedges?

Bourbonnais "A. Yes, Sir.

Mr. Morvillo "Q. Would you tell the court and jury what happended during that meeting?

Bourbonnais "A. I would be glad to. On this particular meeting I was asked to come down to Mr. Tendy's office to identify a man. In the room at the time I believe Mr. Tendy was present, Mr. Hedges, which I know now is Mr. Hedges, myself and one or two other men. I don't recall.

Mr. Tendy turned to me and asked me if I knew this particular man, referring to Mr. Hedges. I

told him that I did not know him. He asked me to be sure, to take another look. I looked for a few moments and again I assured Mr. Tendy that I did not know him at all.

Finally, Mr. Hedges came up to me and said, 'Charlie don't you remember me'?

I said "No, I do not."

He said 'I am the fellow that came up to your car that day and you gave the two suitcases.' He described how he was dressed and then upon this description of that, I recollected the incident.

Mr. Morvillo "Q. Was that the first time that you remem-

bered Mr. Hedges?

Bourbonnais "A. Yes, that was the first time, although I would never have recognized him at the time but, as I said, when he told me what transpired between he and I, I remembered definitely the meetings that had taken place between he and I. There were only two." (Armone Tr. 2606-2607.)

Petitioner's allegations that Hedges recited Bourbonnais' entire testimony is, therefore, at variance with the record and completely lacking in merit.

Additionally, petitioner's alle-

gation that the testimony of Hedges and Bourbonnais was perjurious because of government promises is without merit, as petitioner has failed to demonstrate any perjurious testimony.

Accordingly, we find petitioner's allegation that the government suborned perjury to be without merit.

DENIAL OF ADEQUATE ASSISTANCE OF TRIAL COUNSEL

Petitioner alleges that he was denied adequate assistance of counsel because his attorney, James M. LaRossa, ineffectively cross-examined Charles Bourbonnais. In support of this con-

tention, petitioner points to the fact that at the Armone trial three defense lawyers cross-examined Bourbonnais for a total of 412 pages of trial transcript, whereas at his trial, Mr. LaRossa's and Mr. Hanrahan's cross-examination of Bourbonnais totalled only 49 pages of trial transcript.

Petitioner also contends that Mr. LaRossa stated on the record that he was unprepared to proceed with the cross-examination of Bourbonnais. This allegation is patently frivolous. Nowhere in the record is there evidence that Mr. LaRossa was unprepared to cross-

examine Bourbonnais and petitioner's assertion that Mr. LaRossa stated so is, therefore, a material misstatement of the record.

Petitioner's bald contention that the mere length of a cross-examination is somehow related to the quality of the cross-examination is sheer nonsense. Verbosity and lengthy cross-examinations are the hallmarks of incompetence, not of effective advocacy. Also, petitioner has failed to specify how the cross-examination was ineffective, except for its alleged brevity. That was obviously a tactical decision

and, in our opinion, wise in the circumstances. Petitioner had the good fortune to be represented by one of the most experienced and competent members of the criminal bar of the City of New York and his performance in petitioner's behalf was in the highest tradition of the bar.

Accordingly, we conclude that petitioner's claim of denial of effective assistance of counsel is totally without merit.

DENIAL OF RIGHT TO CALL WITNESSES IN HIS OWN BEHALF

Petitioner contends that he was

denied his right to call witnesses in his own behalf because the prosecution had him tried jointly with his brother, thereby making it morally impossible for him to testify without prejudicing the cause of his brother.

It is axiomatic that persons jointly charged in a conspiracy should be tried together unless it is shown that a defendant will be substantially prejudiced by a joint trial. Rule 14, Fed.R.Crim.P., United States v. Bentvena, 319 F.2d 916 (2d Cir.), cert. denied sub nom. Ormento v. United States, 375 U.S. 940 (1963); United States v. Burgio, 279 F. Supp. 843 (S.D.N.Y. 1968).

Petitioner's alleged moral obligation to his brother does not substantially prejudice his case and, therefore, would not be ground for a separate trial.

Accordingly, we conclude that petitioner's alleged denial of his right to call witnesses and to testify in his own behalf is without merit.

PROSECUTION'S DELIBERATE WITHHOLDING OF EXCULPATORY MATERIAL

Petitioner claims that the prosecution suppressed exculpatory evidence which it was obligated to turn over to the defense in accordance with Brady v.

Maryland, 373 U.S. 83 (1963).

In vague terms, petitioner contends that the government failed to turn over contradictory statements of Charles Bourbonnais given under oath, although petitioner does not identify when or where these statements were made. Petitioner does, however, make reference to alleged inconsistent statements of Bourbonnais given at the Armone trial.

The government has no duty under Brady to turn over contradictory statements of a witness made at a prior trial when the records of that trial

are public. Brady deals with the suppression by the prosecution of evidence favorable to the accused, and it is clearly inapplicable here because the prosecution could not and did not suppress the transcript of the Armone trial.

Petitioner further contends that the government also violated Brady in failing to turn over the results of a lie detector test taken by Bourbonnais. This contention is another palpable misstatement of the record, since the government did turn over the results of the lie detector test when it gave defense counsel 3500 material before Bour-

bonnais testified. See Government Exhibit 75 and Trial Transcript, p. 487 ("Tr. ___").

Finally, we find no merit in petitioner's additional claims in his "Amendment to Motion to Vacate Sentence" that the government failed to turn over as 3500 material the grand jury testimony of Hedges and Bourbonnais. The record is clear that Hedges' grand jury testimony (Government Exhibit 31), and Bourbonnais' grand jury testimony (Government Exhibits 82, 83, 84 and 87) were turned over to defense counsel for inspection. (Tr.], 487 and 559.)

MEMORANDUM OPINION OF MACMAHON, D.J.

Accordingly, we conclude that petitioner's Brady contention is without merit.

PREJUDICIAL CHARGE TO THE JURY

Petitioner claims that the court's charge was "patently erroneous as a statement of law" because it contained an instruction whereby the jury had to find all defendants guilty or all defendants not guilty. On the contrary the court specifically charged that:

> "The guilt or innocence of each defendant must be determined by you separately. In other words, under our law,

> there is no such thing as guilt by mere association. Each defendant has the right to the same kind of consideration on your part as you would give him if he were being tried alone." (Tr. 1141-42)

This claim, furthermore, was squarely raised, considered and rejected on direct appeal and, therefore, will not be considered here. United States v. Guanti, supra, 421 F.2d at 798; Castellano v. United States, 378 F.2d 231, 233, (2d Cir. 1967).

Moreover, the court's charge is not reviewable by way of collateral attack under 28 U.S.C. § 2255. Banks v. United States, 287 F.2d 374 (7th Cir.),

cert. denied, 366 U.S. 939 (1961).

Thus, this claim is also without merit.

CONSPIRACY PROVISION OF 21 U.S.C. § 174 IS UNCONSTITUTIONAL

Petitioner claims that the conspiracy provision of 21 U.S.C. § 174, under which he was convicted, is unconstitutional.

The short answer to this claim is that federal conspiracy statutes have consistently been held to be constitutional. Clune v. United States, 159 U.S. 590, 595 (1895); Callan v. Wilson, 127 US 540, 555-556 (1888); See

MEMORANDUM OPINION OF MACMAHON, D.J.

Dennis v. United States, 341 U.S. 494, 511 (1951); Pinkerton v. United States, 328 U.S. 640, 643 (1946).

Accordingly, this claim is without merit.

Finally, petitioner requests that he be allowed to take a lie detector test. Nothing could be gained by such a test and, therefore, this request is in all respects denied.

MOTION TO DISQUALIFY

The ground urged by petitioner as a basis for disqualification is that the trial judge "has obtained in this

case a bias against myself and my co-defendants, so strong as to affect his objectivity in assessing the claims made in my pending Motion to Vacate Sentence." Though not explicitly stated, this phase of the petition is apparently premised on 28 U.S.C. § 144. That statutue provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state

> the facts and the reasons for the belief that bias or prejudice exists . . . . A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that is is made in good faith."

The moving papers are utterly devoid of any facts showing personal bias or prejudice against petitioner on the part of the trial judge. The statute and the decisions under it make clear that it must appear from the facts presented in the petition that the bias is personal in nature, that is, an attitude of extrajudicial origin as opposed to one acquired during the course

of judicial proceedings. United States v. Grinnell Corp., 384 US 563, 583 (1966); Wolfson v. Palmieri, 396 F.2d 121, 124 (2d Cir. 1968); Rosen v. Sugarman, 357 F.2d 794, 797-798 (2d Cir. 1966); Foster v. Medina, 170 F.2d 632 (2d Cir.), cert. denied, 335 US 909 (1949); Ormento v. United States, 328 F. Supp. 246, 260 (S.D.N.Y.), aff'd without opinion, Docket No. 71 Cr. 1628 (2d Cir., Oct. 28, 1971); Mirra v. United States, 379 F. 2d 782, 787-788 (2d Cir.), cert. denied, 389 US 1022 (1967).

This application, therefore, is

insufficient on its face in that, at most, it seizes upon a few isolated instances out of context occurring during the course of a two-week trial, which petitioner interprets as manifestations of the court's bias against him. Most of these consist of nothing more than the court's overruling objections or denying motions by his counsel or other defense attorneys, which petitioner claims were erroneous. Patently, petitioner's bald conclusions of bias are legally insufficient.

For example, petitioner claims that the court erroneously permitted

Hedges, a co-conspirator, to relate statements made by codefendants Pacelli and Ricucci during the course of the conspiracy which tended to inculpate the petitioner. There was no objection to this testimony, quite obviously, because it is hornbook law that statements of co-conspirators, in furtherance of the conspiracy, are admissible against all conspirators.

Again, as further evidence of the trial judge's bias, petitioner points to the judge's refusal to accept requests to charge from his counsel, after all counsel had concluded their summations

and five minutes before the court charged the jury. Surely, our ruling was not only reasonable and justified but fully supported by Rule 30, Fed.R. Crim.P., which requires the submission of requests to charge at the close of the evidence and not after summations by counsel, a few minutes before the charge, as was the case here. Moreover, petitioner's counsel was given, and availed himself of, a full opportunity to take exception to the court's charge.

Petitioner's other allegations of bias are equally frivolous. In short,

he utterly fails to show "a bent of mind (on the part of the trial judge) that might prevent or impede impartiality of judgment" in the present proceedings. Berger v. United States, 255 US 22, 33-34 (1921).

Finally, 28 U.S.C. § 144 requires, among other things, that an affidavit of bias and prejudice "shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Counsel of record for petitioner upon the trial of this case was James M. LaRossa, and upon the appeal David B.

Isbell and James M. LaRossa. Neither has filed a certificate of good faith on behalf of petitioner. Nor, indeed, has petitioner's present counsel, Henry B. Rothblatt, a member of the bar of this court, retained by him to file the amended petition which added the charge of bias on the part of the trial judge.

The requirement of such a certificate is not a mere technicality but one of the essential requirements of the statute. Ormento v. United States, supra, 328 F. Supp. at 260-261. Although this is a significant defect in the instant motion to disqualify,

we do not rely on it in disposing of the motion.

Neither the petition nor amended petition shows any factual basis for the claim of bias and prejudice. We have never held any personal bias or prejudice, nor acted as a result of any bias or prejudice, against this petitioner nor any defendant in this case. Nor have we held any bias or prejudice, nor acted as a result of any bias or prejudice, in favor of the prosecution. Each and every action of the court is a matter of record. All of our rulings were objective, impersonal, based on

the evidence and incidents happening during the trial, and to the best of our ability were made in accordance with the law, regardless of the party or parties affected.

Accordingly, petitioner's motion to vacate the judgment of conviction and sentence heretofore imposed upon him, for a hearing, and to disqualify the trial judge from considering this application for post-conviction relief is in all respects denied.

So ordered.

Dated: New York, N.Y.
January 5, 1972

/s/ Lloyd F. MacMahon
United States District Judge

CONSTITUTIONAL PROVISIONS AND STATUTUES INVOLVED

Sixth Amendment of The United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Cousel for his defense.

CONSTITUTIONAL PROVISIONS AND STATUTUES INVOLVED

28 U.S.C. 2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be

made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a

denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief

on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also

appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105.

28 U.S.C. 144:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall

proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

As amended May 24, 1949, c. 139, § 65, 63 Stat. 99.